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APPENDIX A — OPINIONS BELOW

ORDER

No. 16,565

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
VS.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for a writ of prohibition, the answer of respondent thereto, and the briefs and arguments of counsel, it is ORDERED that a writ of prohibition be issued prohibiting the respondent from holding a hearing for the purpose of allowing as costs attorney's fees incurred by defendants in the libel actions and expenses incurred by defendants or their counsel in said libel actions; and

That respondent be and he is hereby ORDERED to compute the costs in said libel actions pursuant to the provisions of 28 U.S.C. Sec. 1920 and Rule 54 of the Federal Rules of Civil Procedure.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

OPINION

No. 16,565

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON PETITION FOR A WRIT OF PROHIBITION

DAN SMOOT,
Petitioner,
VS.
HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Decided December 13, 1965.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This controversy was first before this Court on the petition of Smoot for a Writ of Mandamus requiring the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, to grant petitioner's motion to dismiss with prejudice two actions for damages for libel filed by him against the League of Women Voters of the Grand Traverse Area of Michigan and certain individuals as defendants. The motion to dismiss with prejudice was filed by petitioner's present counsel after the District Judge had entered an order requiring Smoot to post $15,000 bond as security for costs. The dismissal had been resisted by the defendants in the libel actions on the theory that they were entitled to have a jury impaneled to hear their side of the case, even

though plaintiff was willing to have the actions dismissed with prejudice at his costs.

We granted the mandamus petition and ordered the District Judge to dismiss the actions with prejudice on payment of all court costs by Smoot. *Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964). Thereafter the District Judge filed an application for rehearing and clarification as to our intent in using the term "court costs", and for a ruling on whether attorney's fees and expenses could be allowed as costs in the libel actions. We denied the rehearing and declined to pass upon that question in the mandamus action.

The defendant then filed a motion in the District Court labeled "Motion For Assessment of Costs" which was for an order requiring plaintiff to pay costs to defendants in the amount of $35,000 for attorney's fees and $1,906.99 for expenses alleged to have been incurred by them during a period of about five months between the dates of the filing of the complaints in the libel actions and plaintiff's motion to dismiss with prejudice. In an affidavit in support of the motion for attorney's fees and expenses as costs, it was stated that defendants would adduce proofs—

> "to show that the statements of defendants, which are the basis of these libel actions are true and privileged and that said actions are groundless and were brought and maintained by plaintiff in bad faith vexatiously and for oppressive purposes."

The petitioner filed a motion to dismiss defendants' motion for attorney's fees and expenses on the ground that the allowance of such items as costs was not within the jurisdiction of the District Court after the dismissal with prejudice. The Court assigned both motions for hearing on the same date and requested each party to estimate the time required to present the motions. Defendants in the libel actions estimated it would take ten days' time to present evidence on their motion.

Before the hearing date petitioner filed a petition for a writ of prohibition in this Court to prevent the District Court from holding a hearing on the motion for allowance of attorney's fees and expenses. We denied that petition

on the ground that the District Court had jurisdiction to hear and determine both motions. Our denial was based on the assumption that the District Court would not order the allowance of costs which were not authorized by the Federal statutes and rules, and on the further assumption that the Court would allow petitioner adequate time to prepare for the hearing on defendants' motion to assess costs after ruling on petitioner's motion to dismiss.

The District Judge denied petitioner's motion to dismiss defendants' motion to allow attorney's fees as costs and refused to certify the question for an interlocutory appeal to this Court. In denying petitioner's motion the District Judge indicated that he had previously decided that attorney's fees could be proper items of costs in certain cases, and that they could possibly be an item of costs in this case. He set a hearing for May 17, 1965 to determine defendants' motion for the allowance of attorney's fees and expenses. The petitioner then filed the present proceeding in prohibition in this Court.

We thought our opinion in the mandamus action made it clear that the dismissal with prejudice precluded a trial on the merits of the libel actions. 340 F.2d 301. Yet this is precisely what the defendants are attempting to have in their motion to assess costs, for they propose to prove that the alleged libelous statements set forth in the complaints were true and privileged and that the actions were groundless. Such an evasion of our order cannot be tolerated.

In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages.

Respondent asserts that the allowance of attorney's fees and expenses for preparation for trial as costs, is a matter properly within his discretion as District Judge. In our opinion the allowance of such items is within the discretion of the District Court in equity cases where exceptional circumstances call for their allowance in order to do justice between the parties. *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). Attorney's fees are also allowable where they are specifically authorized by statute

or provided for by agreement between the parties. *Local Union 984, Internat'l Bro. of Teamsters, etc. v. Humko Co.*, 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962.

However, no authority has been found or cited holding that a District Court has discretion to allow attorney's fees and expenses as part of the costs in an action at law.[1] On the contrary, in *Ruck v. Spray Cotton Mills, Inc.*, 120 F.Supp. 944, 947 (M.D. N.C. 1954), the Court stated:

> "Costs in actions at law in the United States Courts are creatures of the statute. There [is no] Federal Statute permitting District Courts to tax attorney fees as costs in actions at law as distinguished from suits in equity."

And in *Kramer v. Jarvis*, 86 F.Supp. 743, 744 (D. Neb. 1949), the Court stated that "except where it is otherwise provided by statute or rule, attorney's fees are not taxable as costs in actions at law pending in federal district courts." To the same effect see *United States v. Hoffman Const. Co.*, 163 F.Supp. 296 (E.D. Wash. 1958).

To hold otherwise would permit a Federal Court to allow attorney's fees and expenses as costs in a suit for damages for personal injury, assault and battery, or in any other type of action at law which the Court might feel was brought maliciously and without probable cause. This would have the effect of deterring the pursuit of legal remedies in the Federal Courts, which is contrary to the American system of jurisprudence. It would vest unnecessary and unwarranted power in the Court. It would practically dispense with actions in the Federal Courts for damages for malicious prosecution of civil actions.

Respondent contends that Rule 41(a)(2) of the Federal Rules of Civil Procedure permits a District Court to fix attorney's fees as costs. That rule provides that "an

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1 We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit.

28 U.S.C. § 1920 provides for the type of costs which may be allowed by the court. See also Rule 54 Fed.R.Civ.P.

action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court may deem proper."

The cases permit allowance of attorney's fees against the dismissing party where the action is dismissed without prejudice. *E.g., Welter v. E. I. DuPont de Nemours & Co.*, 1 F.R.D. 551 (D. Minn. 1941). The reasoning behind the rule where the action is dismissed without prejudice is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. See 5 Moore's §§41.05, 06. A dismissal with prejudice, however, finally terminates the cause and the defendant cannot be made to defend again. The Court in *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963) rejected the contention that there is no requirement in the Rule that limits it to dismissals without prejudice, and held that attorney's fees are not proper where the dismissal is with prejudice.

Respondent contends that defendant's First Amendment right of free expression will be violated if attorney's fees and expenses are not allowed. Reliance was placed on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in urging that the pendency of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in preparing to prove the truth of the alleged libelous statements. We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The constitution does not protect libelous statements. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

Although the Supreme Court held that these cases did not foreclose its inquiry into the *Sullivan case*, because they did not sustain the use of libel laws to prohibit expression critical of public officials, the Court did not repudiate the cases or the principle. The First Amendment does not require that a person who is sued for libel be guaranteed the cost of defending himself.

On the other hand, the allowance of attorney's fees and expenses here would, in our opinion, violate petitioner's

Constitutional right to a jury trial. The District Court would necessarily have to determine whether the alleged libelous statements were true and privileged and that the actions for damages were brought in bad faith, vexatiously and for oppressive purposes. This would be a hearing to determine if Smoot was liable for malicious prosecution of a civil action, and if so, to render a judgment against him for damages under the guise of fixing costs. The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law. 5 Moore's Federal Practice 2d Ed. §38.11 [5], p. 114.

Although no question has been raised over our jurisdiction, we are of the opinion that power was conferred upon us to entertain the proceeding in prohibition by the All Writs Statute, 28 U.S.C. §1651. 6 Moore's Federal Practice 2d Ed. §54.10[2], pp. 65, 66. Whether such power should be exercised rests within the sound discretion of the Court. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *Ex Parte Peru*, 318 U.S. 578 (1942).

We think this is the type of extraordinary case in which an Appellate Court should exercise its discretion in favor of the granting of the writ. By so doing the parties will be saved the cost and expense of an unnecessary trial to determine an issue which does not exist in this case. It will conserve the time of the Court, which could be devoted better to other meritorious cases requiring judicial attention in the congested Districts of Michigan.

One other matter requires comment and that is the order of the District Court requiring the plaintiff in the libel actions to post bond in the amount of $15,000. The purpose of such a large bond was unquestionably to provide security for the allowance of attorney's fees and expenses.

In the present case after we had ordered the dismissal with prejudice of the libel actions, the District Court at that late date attempted to require the plaintiff in the libel actions to post the $15,000-bond as a condition prece-

dent to granting him a pretrial conference on the assessment of costs.[2]

Since the District Judge was without right in an action at law to allow attorney's fees and expenses as part of the costs, it follows that he had no authority to require the posting of a bond as security for their payment. *McClure v. Borne Chemical Co.*, 292 F.2d 824, 835 (4th Cir. 1961).

A writ of prohibition may issue as prayed for in the petition.

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2 "The Court: Mr. Watts, do you intend to comply with the Court's order requiring you to post a bond of Fifteen Thousand Dollars?

Mr. Watts: No, Sir, we do not intend to comply with the bond.

The Court: When you comply with that we will move ahead with further proceedings, as far as a pretrial is concerned.

Mr. Watts: Let me understand, until and unless Smoot files a bond, — how could he file a bond in a case that has been dismissed?

The Court: Well, as a matter of curiosity, I think in the experience you have had, Mr. Watts, you can answer that yourself, the question of costs, the bond, the order requiring the posting of the bond hasn't been dismissed and the Circuit Court of Appeals has clearly recognized that the question of costs is still before the District Court and that answers itself.

Mr. Watts: Then, as I understand the Court's ruling, until and unless we post a bond, there will be nothing further in the nature of —

The Court: — of a pretrial or any conference of that kind but that doesn't change the hearing date . . ."

OPINION ON PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' MOTION FOR ASSESSMENT OF COSTS AND MOTION TO STRIKE FROM TRIAL DOCKET

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

On August 28, 1964, defendants filed a motion for security for costs, with supporting brief alleging that the plaintiff had brought and maintained these actions in bad faith and for vexatious and oppressive reasons, and offered evidence in support of that position. Defendants claimed that at the conclusion of the case these facts would be more apparent, and for that reason requested that plaintiff be ordered to post a security bond.

At a hearing on September 25, 1964, the court considered the evidence before it, found substantial basis to grant defendants' motion, and on October 2, 1964 an order was entered requiring plaintiff to post with the Clerk of the Court by October 8, 1964 a bond of $15,000.

On February 2, 1965, defendants filed a motion for assessment of costs, including attorney fees and other ex-

penses, in which they again claimed that plaintiff had commenced and maintained these actions in bad faith, vexatiously, and for the purpose of harassing defendants.

Plaintiff's motion to dismiss defendants' motion for assessment of extraordinary costs, by its nature and circumstances in this case, raises two questions:

First, does the district court have jurisdiction to entertain defendants' motion, and

Second, is there presently before the district court sufficient material to require a hearing on defendants' motion?

Each of these questions must be answered in the affirmative.

The first question is answered by the Circuit Court of Appeals in its order of April 7, 1965, when it said at page 3:

> "The District Court has jurisdiction to hear and determine both of the motions which were filed in these actions. Title 18 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure provide for the allowance of costs. The District Judge will be required upon hearing to determine what items are properly allowable for costs under the statutes and rules."

The second question likewise must be answered in the affirmative. By order of the Sixth Circuit Court of Appeals dated December 30, 1964, these actions were ordered to be dismissed with prejudice, subject to the payment "of all court costs" by the plaintiff.

Uncertain as to the effect of this language on the pending motion for security for costs, a petition for rehearing and clarification was submitted to the Court of Appeals, in which it was pointed out that petitioner (District Judge Noel P. Fox) had previously decided that attorney fees could be proper items of cost in certain cases.

The petition sought a clarification of the term "court costs," recognizing that attorney fees might have been excluded as possible items of cost by the order of the Circuit Court of Appeals.

The petition for rehearing was denied, but the order so denying stated that in using the term "court costs," the Circuit Court of Appeals had made no ruling on the question of whether or not attorney fees were properly assessable in these cases.

When this court determined that defendants' motion for security for costs had sufficient merit to require posting of a bond, it decided that in this case attorney fees could possibly be items of cost. This decision was reached after considering briefs and oral argument for both parties, and at that time plaintiff presented the same arguments relating to items properly awardable as costs.

The cases cited in plaintiff's brief on this motion are either distinguishable or unopposed to the proposition that attorney fees are proper items of costs in certain extraordinary cases.

Fleischer v. Paramount Pictures Corporation, 329 F. 2d 424 (CCA 2, 1964), in the excerpt quoted in plaintiff's brief (page 426 of 329 F. 2d) recognizes that attorney fees may be awarded in the exceptional case.

Apple Growers Ass'n. v. Pelletti Fruit Co., 153 F.Supp. 948, held that in exceptional cases the trial judge has discretion to award attorney fees as costs.

Rolax v. Atl. Coast R. Line, 186 F. 2d 473, holds that attorney fees are not *ordinarily* items of assessment, but are more commonly so in equity actions.

Warner v. Florida Bank & Trust Co., 160 F. 2d 766, involved trust remaindermen attempting to recover attorney fees as a matter of course in a case in which they were litigating their interests in the trust fund. The court merely stated that as a general rule adverse parties to litigation are required to pay their own attorney fees. The general rule is not disputed. Defendants strongly urge upon the court that the instant case is an exceptional situation which calls for the assessment of extraordinary costs.

In re Joslyn, 224 F. 2d 223, was a bankruptcy case in which costs were expressly governed by statute, and in Rosden v. Leuthold, 274 F. 2d 747, attorney fees were disallowed because the action was brought under the District of Columbia Code, which explicitly prohibited them. Like-

wise in Tabis v. Joy Music, Inc., 204 F.Supp. 556, attorney fees were sought pursuant to statutory authority.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 13 L.Ed. 2d 248 is distinguishable. It involves no claim of vexatious, oppressive, or bad faith conduct. It is an ordinary contract case involving questions of what is included in ordinary costs. However, it does set at rest the plaintiff's claim that before this court can exercise its jurisdiction in determining costs the Clerk must first tax the costs.

Plaintiff also argues that this hearing is equivalent to an action for malicious prosecution and that plaintiff is therefore being deprived of a trial by jury. It is true that many of the same elements as required in an action for malicious prosecution are essential to establish entitlement to an award of attorney fees. However, this does not automatically mean that plaintiff is being deprived of a right. The procedure for awarding of such items of costs is well established, and were plaintiff's argument to prevail, there would be no such thing as a motion for security for costs or for assessment of attorney fees and extraordinary costs, for in every such instance the party respondent would be able to assert that the proceedings were in fact an action for malicious prosecution and demand trial by jury. Such an argument is patently without merit, for even after a trial before a jury, in such a situation, the trial judge alone must reach a decision as to the propriety of awarding attorney fees by considering all the facts which have been presented.

Furthermore, on the facts of the present cases, this procedure is in accord with well-established principles. The motion was filed before plaintiff's first and second motions to dismiss, at a time when it was still expected that there would be a jury trial of these cases, at which proofs relied upon by defendants would presumably have developed.

The jurisdiction of this court to conduct a hearing on the matter of assessment of costs is recognized in the order of the Sixth Circuit Court of Appeals of April 9, 1965, denying plaintiff's petition for writ of prohibition.

This court, of course, is bound to follow the governing law as set forth under the United States Code and the Federal Rules of Civil Procedure, as interpreted by decided case law.

Reviewing plaintiff's motion, the briefs of the respective parties, all pleadings, all facts and circumstances in these cases, all orders and opinions of the Sixth Circuit Court of Appeals and this court, all of which have been carefully and fully considered by me, the presiding judge, before whom oral arguments were presented this morning, I can find no reason justifying a dismissal of defendants' motion for assessment of extraordinary costs.

Chief Judge W. Wallace Kent and Senior Judge Raymond W. Starr also reviewed and considered all matters in these cases prior to the oral arguments this morning, and they concur in this conclusion.

Therefore, plaintiff's motion to dismiss defendants' motion is hereby denied.

Dated: April 19, 1965.

(s) Noel P. Fox
District Judge

We have read and concur in this opinion.

(s) W. Wallace Kent
Chief Judge

(s) Raymond W. Starr
Senior Judge

APPENDIX B — RELATED DISTRICT COURT OPINIONS

OPINION ON MOTION TO DISMISS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This suit was commenced in March of 1964, and because of the constitutional issues involved, every effort has been made to bring the case to an early trial. By order of the court, pretrial preparations were to have been completed by August 25, 1964.

On October 2, 1964, after the court had set a trial date of October 14, and after counsel for defendants had gone to great expense in preparing for trial by enlisting as witnesses a number of individuals of national prominence, plaintiff moved to dismiss the case. Negotiations between counsel broke down when plaintiff refused to sign a statement of admission, apology and retraction, and plaintiff then submitted his motion to the discretion of the court.

Rule 41(a)(2), Federal Rules of Civil Procedure, pro-

vides for dismissal after service of an answer in a case *only* by order of the court.

This matter is entirely within the discretion of the court. See 2B Barron & Holtzoff, Federal Practice and Procedure, §912, pp. 111-112.

The Seventh Circuit case of Bolten v. General Motors, 180 F. 2d 379, represented the lone example of the belief that the right to dismiss was absolute, the discretion of the court going only to the terms and conditions of dismissal.

However, the Seventh Circuit subsequently reversed itself in Grivas v. Parmelee Transportation Co., 207 F. 2d 334, cert. denied 347 U.S. 913, 74 S.Ct. 477, 98 L.Ed. 1069, where the court stated that the matter of dismissal is not a right, and the discretion of the court in a motion to dismiss goes both to whether or not the motion shall be granted, as well as to the terms and conditions.

> "It is never a pleasant task for a court of review to overrule a previous decision upon which litigants and the District Courts of the Circuit have a right to rely, but we have reached the conclusion that our interpretation as announced in the Bolten case was too broad and that this is the time to modify it. The unanimous view of other courts and textbook writers is that the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of absolute right * * * *." Id. at 336.

See also Adney v. Mississippi Lime Co., 241 F. 2d 43.

Finally, the reasoning in Churchward Int'l. Steel Co. v. Carnegie Steel Co., 286 F. 158, is especially apropos. That was a patent case in which a motion to dismiss was denied. The Court said at Page 160:

> *"Then, too, it seems that the public has an interest in having the validity of a patent established where it is seriously questioned, because what is embraced within the patent belongs to the public and the patent itself is a grant by the public. The interest of the public appears to be greater in such controversies when they relate to manufactured products which are extensively used such as steel."* (Emphasis supplied).

A fortiori, the interest of the public in this case compels this court to a similar holding. To even attempt to say that public interest in freedom of expression is less important than the public interest in steel processes is a misconception of fundamental constitutionally protected rights.

The exercise of judicial discretion in granting motions to dismiss is proper "unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit." Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L.Ed. 849.

Familiarity with this case shows indisputably that dismissal at this stage would greatly prejudice defendants. They have been haled into court by a national figure, accused of besmirching his name and professional reputation, and made the subject of much publicity, since the complained of writing is an integral part of the public purpose for which defendants assert they are organized.

Plaintiff claims that he wishes only to vindicate his name (despite the fact that the suit was instituted for $1,000,000 in March of 1964, and has been desultorily prosecuted since then, neither of which is consistent with eagerness to cleanse one's name of undesirable association), but the circumstances of this case are such that defendants are now in the position equally of wishing to establish their good name.

Defendants, as stated, have retained able counsel, who have pursued the matter extensively and diligently, arranging for witnesses from Washington, D.C., New York, and Little Rock, Arkansas, to mention but a few — people of such importance that they have, defendants' counsel asserts, rescheduled national commitments to be able to appear at this trial. It is doubtful that this array of witnesses could be again duplicated, which means that a dismissal at this stage clearly prejudices defendants.

That such figures are willing to take part in this litigation emphasizes the public concern for the issues which plaintiff has raised by his complaint. Plaintiff has refused to settle the case on the terms requested by defendants, which amounted to a complete exoneration of their activities, and defendants now appear anxious to establish what plaintiff refuses to admit in settlement of the case.

Plaintiff has challenged defendants to a day in court, and because of the nature of this case, plaintiff's refusal to settle, and defendants' preparation, they are now entitled to that day in court.

The public interest in this case is well defined, and in the concern for that interest manifested in this court's written and oral opinions already entered in the case, I deny the motion to dismiss.

Dated: October 13, 1964.

Noel P. Fox,
District Judge.

I concur in the above opinion.

Raymond W. Starr,
Senior Judge.

Certified as a true copy:
Howard T. Ziel, Clerk,
By: G. E. Laxink,
Deputy Clerk.

OCT. 13, 1964.

OPINION ON MOTION FOR JURY TRIAL AND MOTION FOR SECURITY FOR COSTS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

Counsel for plaintiff in this case has failed to properly notify opposing counsel of plaintiff's demand for jury trial.

Failure to serve a demand in proper form and within the time specified constitutes a waiver of jury trial. Rule 38, Federal Rules of Civil Procedure. See 2B Barron & Holtzoff, Federal Practice and Procedure, §879, P. 54, and cases cited.

Furthermore, "the waiver is complete even though inadvertent and unintended, and regardless of explanation or excuse." See Barron & Holtzoff, supra, P. 55, and cases cited.

However, Rule 39(b) does provide for relief in situations of this sort at the discretion of the Court, upon motion by the waiving party.

Thus, in this case the Court is presented with a complete waiver of the right to jury trial and it is absolutely

within the discretion of the Court to grant or deny the motion requesting trial by jury.

The preponderance of authority is against granting such a motion in the absence of misunderstanding, Hargreaves v. Roxy Theatre, 1 F.R.D. 537, honest mistake, Supplies Inc. v. Aetna Casualty and Surety Co., 18 F.R.D. 226, or a good faith attempt to comply with the rules, Rogers v. Montgomery Ward & Co., 26 F.Supp. 707, or unfamiliarity with the rules, Universal Picture Corp. v. Marsh, 36 F.Supp. 241.

None of these is present here; this was simple inadvertence on the part of counsel, which has been held to be insufficient for relief from waiver. Polak v. Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, 19 F.R.D. 87 (D.C. N.Y. 1956), and Wilson & Co. v. Ward, 1 F.R.D. 691.

Finally, long delay in applying for relief from waiver of trial by jury has influenced courts in the exercise of their discretion. See Barron & Holtzoff, supra, P. 75, and cases cited.

Despite this mass of authority which would support a holding to the contrary, this Court, acting solely in its discretion, and fully aware of the lack of support in the authorities cited, feels that the plaintiff should have the privilege of a jury, in view of the nature of the constitutional issues to be decided in the case. A jury composed of twelve members of the community at large should decide whether or not the comments at issue in this suit are of a libelous nature, not a single trial judge.

I, therefore, exercise my discretion in favor of the plaintiff and grant the motion for jury trial.

This Court at this time grants defendants' motion requesting security for costs, and sets the amount at $15,000.

If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation.

If the proofs do not support this claim, the only loss to plaintiff will be the costs of the bond, or the interest on the cash amount for a short period of time, either of which would be offset many times by a recovery of any magnitude.

Under these circumstances, and for the further reason that it is desirable that all matters in this case be finally resolved in this forum, I feel that the granting of this motion is well justified.

Dated: October 6, 1964.

(s) Noel P. Fox,
District Judge.

OPINION

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This is a libel action brought by plaintiff, the featured commentator on a series of television programs dedicated to informing the public on topics of national concern, against defendant League, a non-profit organization, and some of its officers and members, devoted essentially to the same purposes. The subject matter of this action consists of material contained in the December 1963 Bulletin of defendant League and in a letter of the same date to the editor of the local newspaper, each of which contained allegedly libelous remarks on plaintiff's presentation and the content of his program.

At this time the Court is presented with the difficult task of setting a time for the trial of the case, in the face of burdens and obligations on the side of both parties, which must be balanced in arriving at the decision.

The action was commenced in March of 1964, claiming $500,000 damages. The Court issued an order on May 18,

1964, directing the parties to complete all preparations for a pretrial conference by August 25, 1964. On July 15, 1964, a hearing was held on objections to interrogatories, and on September 25, 1964, a hearing was held on defendants' motion for security for costs and to deny a jury trial because of failure to give notice of the demand therefor. Immediately following these matters, the pretrial was conducted, at which plaintiff's counsel notified the Court for the first time of arrangements for a vacation commencing in mid-October and terminating in late November. At the same time, he suggested to the Court that the case be tried some time after January 1, 1965.

The dominating concern for defendants in this matter is the effect which this action has on their exercise of freedom of speech. The pendency of this suit effectively stills the voice of the defendant League of Women Voters and its individual members, and this quite conceivably prevents the free interchange of ideas in the public marketplace. Not only is the Traverse City Branch of the League silenced pro tempore, but branches of the League all over the country will doubtless proceed haltingly in speaking out on political thories advanced by those of differing political persuasions, not to mention all those who are opposed to Mr. Smoot and his particular philosophy of government. The fact that this may or may not be occasioned unintentionally is of no import, for the practical result is that he and those of like mind are free to continue speaking out, while those opposed to that line of thought are not so at liberty until the question of libel here presented is settled.

The dangers inherent in this situation have long been recognized by the courts in this land. In the case of City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923) it was said:

> "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution."

In the recent and widely publicized case of New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, attention was once more focused on the commitment of the courts to the protection of the right to freedom of expression, no matter what form the suppression assumes. It is noteworthy that at Page 269, 11 L. Ed. 2d, at 700, the Court said:

> ". . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

And in discussing the effect of libel actions in this area the Court said at Page 278, 11 L. Ed. 2d, at 705:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."(1)

Thus, this problem must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." New York Times Co. v. Sullivan, supra, at 270, 11 L. Ed. 2d, at 701.

In the mind of this Court, the case before it presents a striking example of the importance of this freedom and calls into play the very essence of the underlying reasons supporting it. Both parties here believe that they are disseminating the political opinion so essential to a functional democracy. The need for such uninhibited opportunity of conflicting opinion has been given expression since the debates which led to the creation of our Federal Constitution.

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more

(1) It is worth noting at this point that the judgment in the state court in the Times case was $500,000, the same amount requested in the complaint in this action. How much more telling is the above quote in light of the fact that here we have not a prosperous newspaper corporation, but rather an impecunious organization which could not survive *one*, never mind a "succession of such judgments."

particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and *on the equal freedom, consequently, of examining and discussing these merits and demerits* of the candidates respectively." Madison's Report on the Virginia Resolutions, Elliot's Debates, Vol. IV, 585. (Emphasis supplied).

The language quoted in the concurring opinion of Mr. Justice Goldberg in New York Times Co. v. Sullivan, supra, is a contemporary account to the same effect, 376 U.S. 254, 297, at 302, 11 L.Ed. 2d 686, 718, at 721:

" '[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, the Right of the People (1958), p. 41".

The extent to which this need is given deference is shown by the following:

"It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved . . ." Coleman v. MacLennan, 78 Kan. 711, at 724, 98 P. 281, at 286 (1908).

Arrayed against these compelling reasons for an early trial, made more so by the approaching national elections and the need for an informed electorate, is the inconvenience which will be caused to plaintiff's counsel by forestalling a long-planned vacation.

While it is the custom of the courts to accommodate attorneys at every opportunity in matters of this kind, as

indeed the Court has done on several occasions in this very case, the facts before me regrettably do not admit of such an accommodation.

Plaintiff's counsel indicates that he had no notion that the case would be placed in the docket so quickly. However, an examination of the transcript of the hearing on July 15 clearly reveals that this Court indicated to both counsel that its docket contained a number of open dates and that it was eager to get this case into a trial posture as soon as possible.

Despite this, and despite the order of this Court that the parties be prepared for pretrial by August 25, the case being subject to call at any time subsequent to pretrial, the first notice to this Court of a rather extended vacation was given at pretrial. Considered in this light, plaintiff's counsel had a duty at the time of the July 15, hearing to give notice to the Court of his plans, and failure to do so now bars objection on that ground.

Even absent these clear evidences of intent to move the case on at any early date, the subject matter itself provides reason enough for this decision. The convenience of attorneys is always subject to their role as representatives of the individuals whose rights are at issue. In the instant case, where the determination of those rights involves a question of such paramount importance as freedom of expression, and where its exercise is effectively stifled until the outcome of the suit, this Court reluctantly denies the request to postpone the trial date, and hereby orders that this case come on for trial on October 14, 1964.

While there is a quantity of exhibits to be examined by the plaintiff, this should not present too great a burden, since it must be presumed that any commentator who speaks with authority, as Mr. Smoot does, has already investigated his topics somewhat thoroughly, and should be able to give able assistance to his counsel on these exhibits.

For the reasons stated, I am issuing an order for trial pursuant to and concurrent with this opinion.

Dated: September 28, 1964.

(s) Noel P. Fox,
District Judge.

APPENDIX C — CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

Constitutional Provision Involved

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statute Involved

28 U.S.C., Section 1920, 62 Stat. 955:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this Title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Rules Involved

Federal Rules of Civil Procedure, Rule 41(a):

"(1) Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Federal Rules of Civil Procedure, Rule 54(d):

"(d) Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."